being a special Act, when the special Act is prohibited by section 59 as well as 51 of the Constitution, and Counsel employment is controlled by General law, section 112-5? Decided by Court of Appeals of Kentucky, such counsel cannot appear and such party cannot file suit.

11. Where a THREE JUDGE COURT finds the plaintiff has an adequate remedy at law, is a prior suitor compelled to abandon Federal trial court, without jurisdiction being assailed, if questions arising under laws of United States are pleaded, and jurisdictional amount and diverse parties are shown. No; Rule 39 and authorities, Hale vs Allison 188 U. S. 56, Also rule 75.

12. Both conclusions of law, if only legal questions are presented, and if any facts are presented, findings of fact must be made or cause will be returned for such findings. Rule 70½ and Humphrey vs Helgerson 78 F. (2) 706-8, Interstate vs U. S. 304 U. S. 55.

"Let the cause be remanded for such failure with permission to make such defense on the merits as pleadings show."

Taylor vs Breese 163 Fed. 678, is the rule.

JURISDICTIONAL STATEMENT

Under Section 374, USC Title 28, Judicial Code 240, Certiorari from the Circuit Court of Appeals, and Section 347 Sub-paragraph A, application is author-

ized to the Supreme Court of the United States, under the issues made in the hereinafter litigated issues.

> "In any case, civil or criminal, in a Circuit Court of appeals, either before or after a judgment or decree by such lower court, for determination by the Supreme Court with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."

United States Code, Title 28; 877, provides that the Supreme Court, upon determination of the case, shall remand it to the proper District Court or the Circuit Court of Appeals for further proceeding in pursuance of such determination. If the Circuit Court of Appeals has failed to consider the case, then in that event, it will be remanded to that court. Where no findings of fact have been made in a case when demanded the Supreme Court will remand to the District Court with directions to make the findings. Where the real situation is not disclosed on the petition for certiorari, or where a question differs from that disclosed in the petition developed on argument, the writ will be dismissed. Sustaining this position are the following cases.

Lutcher and Moore Lumber Co. vs Knight, 217 U. S. 257.

Lonergan vs U. S., 303, U. S. 33.

Panama Mail Co. vs Bargas 281 U. S. 670.

U. S. vs Rimer 220 U. S. 547.

Supreme Judicial Code Sections 240, etc.

STATEMENT OF FACT

In its original inception, this case was brought by your petitioner in the United States District Court for the Eastern District of Kentucky, on the 24th day of February, 1938, against J. W. Martin, acting for the Commonwealth of Kentucky, who, as Internal Revenue Commissioner, on the 15th day of February, 1938, had attached the business and assets of the Central Distributing Company, hereinafter referred to as the Central Company, in Campbell County, State of Kentucky. This attachment asked for approximately $4,500, Domestic and Import Taxes, alleged to be due the Commonwealth of Kentucky, under the terms of an act licensing wholesale liquor dealers under 1934 enactment, by the Legislature of Kentucky; and a tax act enacted on the 30th day of April, 1936, by which acts, the wholesaler was required to pay a consumer's tax of $1.04 per gallon before the sale of the liquor, and $.05 per gallon before the importation of the liquor into the State, a $.05 per gallon tax being exacted from the distiller as a manufacturer's tax, and if the liquor was shipped out of Kentucky and stored in another state, and sold and returned to the State of Kentucky, the $.05 per gallon tax would be again exacted, although the Act provided that no two taxes should be levied on the same gallon of whiskey.

The Act of 1934 was a Beverage Sales Act, and authorized wholesalers to buy and sell whiskey as a beverage. The Act of 1936 which provided for the tax would have been useless, and without exercise of power granted by the legislature unless the 1934 Act was a valid and subsisting statute.

Amendment 7 of the Constitution of Kentucky at that time prohibited the sale of liquor as a beverage, and prohibited the licensing of a wholesaler for the purpose of engaging in such a sale as a beverage. The Act was therefore void. The Act of 1936 which required the wholesaler to pay the taxes, both import and domestic, was therefore a complementary act, and by the Legislature of Kentucky was duly enacted, without any authority under the Constitution, because the sale of an article prohibited by the Constitution could not be taxed except in the form of a penalty and this Act did not provide a penalty tax only but an excise tax on the sale of merchandise in a lawful business, or one authorized by law. Therefore it will be contended here that neither Act was a subsisting statute.

The Court of Appeals of Kentucky, the highest Court in the State had frequently held that liquor could not be sold as a beverage under Amendment 7 of the Constitution. It had also held that the laws of the United States and the decisions of the Supreme Court of the United States were as much a part of the laws of Kentucky as the laws enacted by the Legislature of Kentucky; and that any statute enacted by the Legislature in violation of the Constitution of the State was no statute and might be disregarded as no law by mankind.

THE QUESTIONS INVOLVED IN THE RECITED POINTS

We are considering the questions here, raised by the points as shown in the record, without regard to exactness and number.

The first question presented, is, that the United States District Court for the Eastern District of Kentucky should determine its jurisdiction which it did in favor of the cause of action filed by the plaintiff. The Plaintiffs were not parties to any other action at that time, in the State of Kentucky, and therefore, this action had priority, in respect to the plaintiffs, your petitioners, who will be referred to as plaintiffs' in this brief, so that in discussing the issues here, they will be discussed with the understanding that no other action could affect this litigation, because the right to pursue the Federal Court as a Forum was a constitutional right, as citizens of Ohio; questions arising under the Laws of the United States, although the citizenship and the amount involved were sufficient to give the Federal Court jurisdiction.

The trustee under the mortgage.

A mortgage was executed long prior to the attachment, which was attached to the petition and which was duly filed and certified in the County Court of Campbell County at the time the attachment was sued out, which was for the sum of $3,000, money borrowed by the Central Company from your petitioners who resided at Cleveland, Ohio.

The suit was therefore for the purpose of foreclosing said mortgage and to recover taxes collected under the Illegal Assessments amounting to about $22,000, not including other assigned claims. These taxes were assigned to the plaintiff's by the Central Company for money advanced in the trade and the payment of Federal Taxes on liquors withdrawn from warehouses.

The assets of the Central Co. were seized by the Sheriff of Campbell County and the business closed and destroyed. The assets on hand at that time amounted to approximately $2800, and judgment was asked in the State Court, Franklin County, for approximately $4,500, about $1,400 of which was for illegal penalties never legally assessed, under these statutes.

THE ORDER OF DISMISSAL RELIED ON IS VOID, ON SEVERAL GROUNDS, ONE WITHOUT DISPUTE ARGUMENT.

QUOTATIONS ARE IN SUBSTANCE:

A cause pending in the Western District in a county transferred to the Eastern District, the Western District lost jurisdiction, and could not make any order thereafter, not even tax the costs.

It is quite true that the descriptive term has since been given another meaning but that does not change the particular legislative intent to include just the territory properly described by that description. It was excluded from another territory, and excluded from the jurisdiction of the rendering court.

"The Court was without jurisdiction of any of the causes of action, and I will dismiss the complaint. The order was a judicial act, the court has no power to make it, and it can only be done at the next stated term of the Court at Toledo, (not at Cleveland in the same district).

Sitting at Cleveland the Court had no jurisdiction to make an order pending in the district court at Toledo."

McClashan vs. U. S. 71 Fed. 434. Ex.B. pg. 41 C.

"The judgment is inoperative and void"

"Trial and judgment must be in the district"

U. S. vs. Kissel 63 Fed. 433.

Williams vs. Gea. Gully, 29 Federal Cases 17,736

"Has no authority to enlarge jurisdiction so as to hold a term of court in another district."

Hartford Fire Ins. Co. vs. Erie RR Co. 172 Federal 899.

"Such jurisdiction cannot be conferred by waiver."

"Limits the jurisdiction of the court when holding a term to the territorial limits of the district for which that term is provided."

The Sarah Kennedy, 25 Fed. 569.

Must sit in the district where the cause of action arose, judgment out of the district is a nullity.

9th Circuit, Seattle Electric vs. Hartless 144 Fed. 379, Tacoma Railroad vs. Geiger 145 Fed. 76.

Wan Lee vs. U. S. 44 Fed. 708. Same conclusion. The division for which that term is provided must be tried in the district where the court is sitting.

Territorial limits are defined by statute, and a proceeding outside the district is void, for the defendant must be sued in the district where he resides.

Hall vs. Devoe Manufacturing Co. 108 U. S. 415.

The Act of March 3, 1887—McGlashan vs. 71 Fed. 436.

Kibler vs. St. Louis Ry. Co., "Must be in the limits of the counties enumerated in the bill. 147 Fed. 879, U. S. 45 Fed. 159.

Pitman vs. Kibler, 147 Fed. 879. Pitman 45, 159. Butler vs. U. S. 87 Fed. 625

Common law court is in session from date fixed by law until it adjourns at the time and place fixed by law.

Same case:

Rosencrans vs. U. S. 165 U. S. 263

Case cannot be transferred from one district court to another. Where Congress has legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by mere inference.

Section 83 U. S. C. of the Judicial Code fixes the limits of both Kentucky districts and the terms of court, and judgment can only be rendered in the territorial limits of that district, not even can it be waived, nor can judgment be entered out of terms of court fixed by law or special term fixed by the court.

NO SERVICE WHATSOEVER WAS EVER HAD ON THE CENTRAL COMPANY AS PROVIDED BY THE STATUTE AND CODE OF KENTUCKY.

Page 16, 17, 18, 19, 20 and 24 Pet. of Central Co.
Page 16-19 C.

The service or order of attachment was issued by the Clerk of the Franklin Circuit Court to one Philips its Sheriff, directing him to serve on William

Ploss, designated service agent, who resided in Campbell County, the order of attachment. The Sheriff of Franklin County cannot serve an order of attachment in any county other than where he resides. *An order of attachment cannot be served by any other person except the officer to which it is directed.* It was served by Louis Sickmeier, the Sheriff of Campbell County, where the place of business was located. The service was not made on the service agent William Ploss, and therefore not served on the person which the order directed it to be served on, nor by the *officer* who was directed to serve it. The *place of business* was located in Campbell County, the vice-president and secretary were in Campbell County, and in the place of business when the sheriff attempted to serve the order. He never served the order on an officer of the corporation, but did serve the order on Harry Bayer, an individual who had no relation whatsoever as an officer, stock holder, director or manager of the corporation.

He was agreed upon as the trustee or bailee of the mortgagor and mortgagee to dispose of the assets and complete the business of liquidating the affairs of the corporation. Under the laws of Kentucky, merchandise in the hands of a *trustee or bailee is not subject to attachment.* The return of the officer, Sickmeier, shows that the service of the order was made on Harry Bayer, manager of the Central Company. There was no such officer, as shown by the affidavits and testimony. The affidavits were before the court in support of a motion for judgment on April 11, 1938, in support of a restraining order, pending an application to a *three judge court* to determine the question of a *preliminary injunction only.*

Under the laws of Kentucky in respect to service of process, an affidavit may be filed to determine whether there is jurisdiction in the court or not. The Court refused and failed to determine this question, and has never determined it, and as to the merits, that petition is still pending and has never been answered, and J. W. Martin is in default as well as the Commonwealth of Ky. and Louis C. Sickmeier.

The Trial Court denied the motion to refer to three judges. The plaintiffs appealed to the Circuit Court of Appeals by mandamus, and that court notified the District Judge that the court would sustain the mandamus, who promptly withdrew his previous order and made an order referring the cause to a three judge court.

NO SUMMONS WAS EVER SERVED.

Pgs. 16-17-19 C. (Refers to Central petition).

It was clear from the record that no summons was ever served on The Central Company or on any individual determined by cursory examination of the record, and the Trial Court was duly informed of this fact, and knew that under the laws of Kentucky, the statute, the code of practice, and numerous decisions of the highest court of the state that no jurisdiction could be obtained by any court in Kentucky unless a summons was first issued on the cause of action and served before the service of the attachment or at the time of the service attachment, consequently, he knew, and the three judge court knew, that the State Court was without jurisdiction, had seized the property without due process and had taken the res from the United States District Court,

against which a mortgage existed, and no general appearance made.

THE HEARING AT LOUISVILLE VOID.

Ex. B. Pg. 41-C. (Central petition).

The order of the court, was, that the three judge court should sit in the City of Louisville, which is a place outside of the Eastern District, where this action arose, and where the District Court must sit to make valid and judicial orders. The Act defining the District is Judicial Code 83, which places Jefferson County, where the Court sat, in the Western District of Kentucky.

At the time of the sitting of the Court, which was ordered by the District Judge out of the district, April 12, 1938, the term of said Court extended from the first Monday in April to the third Monday in October, of each year, so that within this District the Court must sit within this time and hold its session according to the rules of the Supreme Court "in a building provided for this purpose," or if it is not held according to this requirement, "it can only be held at such other times and places as may hereafter be provided by law." The order of the Court to hold the hearing at Louisville was not within the terms of the statute. It has been repeatedly held that a judge in one District cannot proceed into another District and hold his court, and as a three judge court, is a supplemental district court, it, of course, would have no jurisdiction to make any valid order or enter any valid judgment in the City of Louisville. (Record, pages———).

THE QUESTION INVOLVED HERE.

Ex. pgs. 46-47. (Central petition).

The immediate question involved here is, that if the judgment at Louisville, denying the injunction, is to be relied upon, then it defeats the action of both the District Court and the Circuit Court of Appeals, in denying the right to try the merits of the case. This, because the three judge court adjudicated at Louisville that the plaintiffs had the right to try the merits of the Cause of Action on the law side of the United States District Court for the Eastern District of Kentucky, because they decided that *no injunction* would be granted because the plaintiffs had an adequate remedy at law, which language means, as interpreted by the Supreme Court of the United States and all of Circuit Courts of Appeal, except one, that the right of trail by a jury on the merits has not been considered as an issue in the equity court where the injunction was determined. Inasmuch as the United States District Court took jurisdiction, "adequate remedy at law" means, within the terms of the statute governing the trial of common law issues to a jury. This right was denied by the order of the District Judge on February 29, 1940, sitting in the City of Covington, Kentucky.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Ex. A. pg. 40-C.

The appeal to the Supreme Court of the United States by the plaintiff from the order of dismissal entered on April 16, 1938, was duly made, and was

duly affirmed by the Supreme Court in respect to the right to injunctive relief against the defendants *who had seized the res.*

This order of dismissal was void, had the questions of jurisdiction been raised, the record would so show. This Because, no appeal can be taken from a void order of court. This court order was void because it was made out of the District. It was also void because, signed by three judges, both the Federal Code and Statute requires that it be signed by the District Judge. The jurisdiction ends under Section 266 of the Judicial Code when the three judges deny the injunction. It was void because an order of dismissal cannot be sustained if entered by three judges. This alone, is within the jurisdiction of the single District Judge.

The Supreme Court of the United States has frequently held that no appeal will lie to that Court only in an injunction proceeding, because the merits of the case cannot be considered before the three judge court, could not be considered by the supreme court, and therefore could not be reviewed upon appeal.

The principles of law are so elementary that we cite only a few decisions later in this brief.

THE MANDATE OF THE SUPREME COURT.

The mandate of the Supreme Court of the United States came back to the United States District Court with nothing in said mandate to justify the District Judge denying a trial on the issue precipitated in said petition, and, if the issues so precipitated were insufficient to justify the denial of a trial of the ac-

tion it was the duty of the court to make a finding, either of fact, or a conclusion of law, in order to justify any support of his judgment. If there are no facts, he is not released from making his conclusions of law, as in either case he must rely upon the record as it stands, or upon findings of fact, to reach a final judgment.

WHAT THE PETITION CALLS FOR.

The amended petition of April 11, 1938, called for a foreclosure of the mortgage, a common law issue, a demand for $22,000 of illegal taxes or more, and a demand for damages for the destruction of the business, the seizure of the property, and the return of both import and consumers taxes, if the injunction should be denied or affirmed, in either case.

Durrett Case, 23 Ky. 547.

THE ORDER OF THE COURT OF FEBRUARY 29, 1940.

Ex. A pg. 40-C.

The Court entered an *opinion,* not a decision nor a judgment on this date, reciting that the judgment at Louisville on the order of dismissal *was a full and complete determination of all of the issues in this case.* The appeal was taken from this order to the Circuit Court of Appeals for the Sixth Circuit. This appeal was denied by the District Court for the Eastern District, or rather the Hon. Mac Swinford, the Judge thereof, in chambers. The Court of Appeals also on May 15, 1940, denied appeal from said order, and refused to make findings or to sustain

the motion for findings filed by the plaintiffs in this action. Of course, the Circuit Court of Appeals can do no such thing. They must make findings, and if there are no facts before them controverted they must write conclusions of law, so this court may be advised what reasons they had for denying the appeal and denying the mandamus. Rec.

If the order of February 29, 1940, was not an appealable order, the only other remedy was mandamus, and if the Circuit Court had no jurisdiction, it must say so, so that the plaintiffs in this action could act accordingly. As we have said, the District Court and the Circuit Court of Appeals must make findings of fact and conclusions of law, and neither Respondent made *such findings* or conclusions.

THE UNITED STATES DISTRICT COURT JUDGE HAD NO JURISDICTION TO PROCEED AS HE DID.

Ex. D pg. 41-C.

In the first place, motions were made to dismiss the cause of action and discharge the attachment by orderly process, and secure possession of the res which was denied by the Court.

A motion was made to proceed pro-confesso, as by summary judgment, and also to dismiss the cause of action in respect to the defense of the Commonwealth of Kentucky. All of these motions were denied by the Court or the Judge.

July 1, 1939 *was the dead line of jurisdiction.*

Section 780, USCA, provides that unless a defendant, who disappears by resignation from office,

revives such defense, under the Code of Kentucky and under this Section of the Statute, the defense ceases to exist, and the attorneys for such defendants disappear from the record, and the cause of action.

The action should then proceed ex-parte. This, on this record, because the only question pending before this court was the motion for judgment on April 11, 1938, made by the plaintiffs, when J. W. Martin was a party. This was a motion against the default of the defendants to plead. Under the Federal Code and the Code of Practice in Kentucky, and under the Statutes of Kentucky, an answer or a pleading must be filed within twenty days after the service of the summons. No pleading was filed from the 24th day of February, 1938, up to April 16, 1938, which approximately was one month and twenty days. No leave of court was asked to file the motion to dismiss before the *three judge court* and the filing of which, and the judgment based on which, was objected to and excepted to by the plaintiffs in this action. No judgment can be rendered and no pleading filed on which said judgment is based, when not filed by leave of court if the defaulting party has not filed a pleading within the terms of the code or statute. If objection is not made such pleading will be considered as having been filed with consent of the opposing parties. Rec.

LET US TAKE A LOOK AT THE RECORD AND SEE.

If J. W. Martin could answer for the Commonwealth and if there was really an objecting plaintiff, or, whether he was a proper party to defend the

action under the authority of the Commonwealth, in order to determine whether the motion of April 11, 1938, for judgment, could be sustained on this ground. We contend the Commonwealth of Kentucky could not answer, and could not make the motion to dismiss in the City of Louisville on April 16, 1938, and that the injunction applied for at that date should have been granted for the reason, that there was no denial and no motion filed, challenging the pleadings of the plaintiffs. THIS WAS AN ACTION IN RESPECT TO TAXES, ATTEMPTED TO BE COLLECTED BY THE COMMONWEALTH IN A STATE SUIT, AND THE PETITION TO RECOVER TAXES UNLAWFULLY PAID TO THE STATE UNDER INVALID STATUTES WHICH INCLUDED AN IMPORT TAX, A CLEAR VIOLATION OF ARTICLE 1 SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES, REGGULATING COMMERCE.

The proper party to this action, and to the void proceedings in the State Court against the Central Company *was the Attorney General of the State of Kentucky and the Auditor.* The Act of 1934, Section 10, provides that the Auditor must bring the action. Where a special act provides for official action, the person named in the action must bring the action, and so in a suit to collect taxes, unless this special act is of itself void or in conflict with the general law on the subject he must act. We conclude the act is void, but in such an event we fall back on the Statute. This special section is as follows:

> "Section 10 of the Original Act 1934 to pay the taxes imposed herein within fifteen days after the same has become due, he or they shall

be deemed delinquent and a penalty of twenty per cent on the amount of license tax due shall attach, and the Auditor shall at once cause such proceedings to be instituted for the collection of such license, with such interest and penalties as may be provided by law for the collection of other taxes."

Section 4169, Article 9, provides that the Auditor must bring the action for all defaulting obligations and taxes due the State of Kentucky. Section 112-5 of the General Statutes provides that the Attorney General himself shall bring this action, as Attorney General, and is a proper party to the action, on whose relation is may be brought; that he is a necessary party and a necessary counsel, has been frequently determined by the highest court in Kentucky. Without repealing any general law a statute was passed by the Legislature, which is a special statute, giving authority to the Internal Revenue Commissioner to collect taxes. This statute is void because Section 59 Constitution, requires that when a general law can *be enacted or is enacted,* concerning a subject matter of legislation, no special act will be constitutional. This Constitution also provides in Section 51 that before an amendment can be enacted, amending a general act, the original action must be recited in the statute which is repealed, then the amended statute must be reenacted as a whole. None of these provisions of the Statute were complied with, and at any rate, if the tax sought to be collected by the Commonwealth in this State action against the Central Company is to be considered a valid collection, then the Commonwealth is estopped from denying that the Auditor cannot bring this action. (Same law).